Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Petitioners,
v.
NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS INFORMING THE COURT OF A RECENT LEGISLATIVE PROPOSAL

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This petition presents the issue whether the Court should reconsider the statutory issue previously settled in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). In response to the brief of the United States as amicus curiae in support of the petition, Respondents noted that, if the executive branch desires changes in the regulatory structure of which the *Keogh* doctrine is a part, it remains free to seek them from the legislature. Supplemental Brief Of Respondents In Reply To The United States As Amicus Curiae at 4-5 & n.8.

Since that Supplemental Brief was filed, Amicus, through the Department of Transportation, has in fact proposed legislation that would repeal all ICC regulation of the rates and tariffs of motor carriers of property such as the Respondents. *See* DOT Legislative Package of Sept. 12, 1985 (Appendix). More specifically, the

legislation would, if enacted, "eliminate all remaining ICC regulation of trucking rates . . . ," "eliminate tariff publication requirements," and "eliminate antitrust immunity for collective ratemaking." *Id.* In short, Amicus has proposed repeal of the regulatory underpinnings of the *Keogh* doctrine, and has done so in the proper forum: the Congress.

Respectfully submitted,

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September 23, 1985

APPENDIX

APPENDIX

U.S. DEPARTMENT OF
TRANSPORTATION

News:

Office of the Assistant Secretary
for Public Affairs
Washington, D.C. 20590

FOR IMMEDIATE RELEASE
Thursday, September 12, 1985

DOT 87-85
Contact: Jennifer Hillings
Tel: (202) 426-4570
Wilbur Martin
Tel.: (202) 426-4321

DOT SECRETARY DOLE PROPOSES
TOTAL ECONOMIC DEREGULATION
OF INTERSTATE TRUCKING INDUSTRY

Secretary of Transportation Elizabeth Hanford Dole today sent to Congress legislation she said "will complete the job of economically deregulating the interstate trucking industry.

"The regulatory reforms already enacted have been a good first step, resulting in increased competition, more efficient distribution of goods, and simplified rate structures," the Secretary said. "Now is the time to take the final steps in removing outdated and unneeded restrictions."

The proposed legislation does not affect federal truck safety standards, which are set and enforced by the Department of Transportation's Bureau of Motor Carrier Safety and National Highway Traffic Safety Admin-

istration. Nor would the legislation change current statutory provisions requiring DOT to set financial responsibility requirements, such as insurance.

Consumers and shippers both will further benefit from removal of the last economic restrictions on trucking, Dole said, because "motor carriers will be permitted to carry whatever commodities they choose, over whatever routes they choose, at whatever rates are mutually agreeable to them and to their customers." She added that numerous studies show that the overwhelming majority of even the most rural shippers are receiving trucking service at least as good as it was before reforms began.

Under the proposed trucking legislation, consumer protection in household goods carriers' operations would be transferred from the ICC to the Federal Trade Commission.

The legislation would also:

* Eliminate all remaining ICC regulation of trucking rates and carrier entry into the business.
* Eliminate antitrust immunity for collective ratemaking.
* Eliminate the "common carrier" obligation.
* Prevent states from imposing new regulations on operations that previously were regulated by the ICC.
* Eliminate all ICC truck leasing rules.
* Eliminate tariff publication requirements.

Initial partial deregulation of the trucking industry has been in place for five years. President Reagan called for further motor carrier deregulation in his State of the Union message last January.

At the same time she sent the trucking legislation to Congress, the Secretary forwarded legislation proposing

to eliminate all Interstate Commerce Commission regulation of the surface freight forwarder industry and on domestic water carriers.

The freight forwarder bill is similar to the trucking proposal. It would remove ICC jurisdiction and would eliminate antitrust immunity for the freight forwarders.

The water carrier legislation proposes to eliminate all ICC jurisdiction over domestic water carriers—barges, intercoastal and Great Lakes carriers. Because of exemptions in these areas, the ICC currently regulates less than ten percent of water carriage.

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

Sep. 12, 1985

The Honorable George Bush
President of the Senate
Washington, D.C. 20510

IDENTICAL LETTER TO:
The Honorable Thomas
P. O'Neill, Jr.
Speaker of the House of
Representatives
Washington, D.C. 20515

Dear Mr. President:

Economic regulation of the transportation industries began some ninety-eight years ago. While this regulation may have served the national interest well for a long time, much of it has now become an expensive paper chase with no offsetting benefits to consumers. It is now time to eliminate those elements of economic regulation which no longer provide any benefits to shippers or consumers. To accomplish this purpose I am transmitting three bills:

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes";

"To amend subtitle IV of title 49, United States Code, to reduce regulation of surface freight forwarders and brokers, and for other purposes"; and

"To amend subtitle IV of title 49, United States Code, to reduce regulation of interstate water carriers, and for other purposes."

These bills, entitled, respectively, the Trucking Deregulation Act of 1985, the Surface Freight Forwarder Deregulation Act of 1985, and the Interstate Water Carrier Deregulation Act of 1985, eliminate Interstate Commerce Commission regulation of those industries. The three bills are designed to build on the regulatory reforms effected in recent years through administrative changes made by the Interstate Commerce Commission (ICC), and through the legislative reforms provided by the Motor Carrier Act of 1980 and the Household Goods Transportation Act of 1980.

In the case of *motor carriers of property*, these reforms have worked extremely well. They have removed a considerable regulatory burden on the trucking industry, permitting carriers to increase the efficiency of their operations and to respond more rapidly and effectively to changing market conditions. These companies now compete relatively freely with each other because of liberal entry and operating restriction removal procedures. There is a more competitive environment, with more service and rate options for shippers, in many cases even for small shipments. The great majority of shippers believe the reforms have been advantageous to them. In sharp contrast to the arguments of opponents of reform that service to small communities would suffer, numerous studies show that the overwhelming majority of rural

small town shippers are getting service at least as good as before the reforms.

These reforms comprised a good first step in the right direction. It is now time to take the necessary final steps to complete deregulation of the trucking industry.

The bill builds on the evidence and recommendations of the Motor Carrier Ratemaking Study Commission, by eliminating the antitrust immunity now enjoyed by the trucking industry. The evidence compiled shows clearly that such immunity has raised rates unnecessarily and has not prevented undue discrimination.

The entry and rate regulation of the trucking industry that currently remains is unneeded and undesirable because there is ample competition within the trucking industry as well as competition from other modes. Such regulation suppresses managerial initiative and innovation, and wastes valuable taxpayer dollars and resources that the trucking industry could employ more usefully in improving its productivity.

Freight forwarders and *brokers* are intermediaries who arrange transportation for others. There is no justification for the continued regulation of either brokers or freight forwarders, as there is ample competition not only among and between them, but also competition from trucking companies and unregulated shipper associations.

Interstate water carriers have nominally been regulated by the Interstate Commerce Commission since the Transportation Act of 1940. However, as a result of numerous exemptions, ICC water carrier regulation applies to less than ten percent of interstate water transportation. The ICC-regulated intercoastal, inland waterways and Great Lakes transportation markets have no public utility basis for regulation, as numerous water carrier competitors exist, entry is easy, and investment requirements are relatively modest. Thus, the continued regulation of domestic water carriers is unneeded.

The Office of Management and Budget has advised that enactment of this proposed legislation would be in accord with the President's Program.

Sincerely,

/s/ Elizabeth
ELIZABETH HANFORD DOLE

13 Enclosures

4 Summaries
3 Charts
3 Bills
3 Sectional Analyses

Enclosure 1

SUMMARY OF DOT DEREGULATION LEGISLATION

The *trucking* bill would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff publication requirements;
- eliminate the "common carrier obligation";
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on operations that previously were regulated by the ICC; but
- not change current statutory provisions requiring DOT to set financial responsibility requirements.

The *freight forwarder* bill is similar to the trucking proposal. It would remove ICC jurisdiction over freight forwarders and would eliminate their antitrust immunity. It would also remove express and sleeping car service (such service no longer exists) and transportation brokers (who compete with freight forwarders) from ICC jurisdiction, and eliminate the restriction against forwarders acquiring control over motor carriers.

The *domestic water carrier* bill would eliminate ICC jurisdiction over all water carriage (barges, Great Lakes, and intercoastal shiping (sic)). Because of extensive exemptions, the ICC currently regulates less than ten percent of water carriage.

Each bill would become effective July 1, 1986.

Enclosure 2

SUMMARY OF DOT TRUCKING DEREGULATION LEGISLATION

The *trucking* bill would eliminate all remaining ICC regulation of the truck industry. It would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- *not* change current statutory safety provisions and those requiring DOT to set financial responsibility requirements;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff filing and publication requirements;
- eliminate the "common carrier obligation";
- eliminate all ICC truck leasing rules;
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on trucking operations that previously were regulated by the ICC; and
- become effective July 1, 1986.

Comparison of Draft Motor Carrier Legislation With Current Statute

[Excerpt]

	Current Statute	Draft Motor Carrier Legislation
CHAPTER 107: RATES AND TARIFFS		
Antitrust Immunity	Immunity for joint-line rates, general rate increases, collective classification; single-line immunity was removed on July 1, 1984	Remove all immunity
Tariffs		
Requirements to Make Tariffs Available	ICC recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Requirement to File Tariffs With ICC	Icc recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Maximum/Minimum Rate Jurisdiction by ICC	Yes	Remove jurisdiction
Nondiscrimination Jurisdiction by ICC	Yes	Remove jurisdiction (would still be subject in part to antitrust statutes)
Zone of Ratemaking Freedom	Yes (but rarely used)	Remove

* * * *

Enclosure 8

A BILL

[Excerpt]

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Trucking Deregulation Act of 1985."

PURPOSE OF THE ACT

Sec. 2. This Act is a part of the continuing effort by Congress to reduce unnecessary and burdensome government regulations and to insure the competitiveness and efficiency of motor carrier transportation in the United States. It is intended to further amend the Interstate Commerce Act, as amended through the Motor Carrier Safety Act of 1984.

CONGRESSIONAL FINDINGS

Sec. 3. (a) The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the present and future; that, historically, the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities, small businesses, and others to enter the trucking industry; that protective regulation has resulted in operating inefficiencies and anticompetitive pricing, has tended to suppress technological and managerial innovation, and has tended to restrict the range of price and service

options available to shippers; that available evidence suggests that significant competitive and consumer benefits have been associated with the partial deregulation of the Motor Carrier Act of 1980 and that the remaining regulations are unnecessary and impose costs on society; that commercial laws have general applicability and are more appropriate for meeting desirable goals than specific regulations; that adequate protection for shippers and consumers can be provided by shifting certain functions to other agencies or by applying the antitrust laws; that in order to reduce the uncertainty felt by the Nation's transportation industries, many of the Interstate Commerce Commission's remaining responsibilities for the regulation of motor carrier transportation should be legislatively, rather than administratively, reduced and the Commission should be given well-defined parameters within which it may exercise its remaining jurisdiction, subject to Congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption consistent with achieving the reforms enacted.

(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 3 years following the effective date of enactment of this Act, to ensure that this Act is being implemented according to Congressional intent and purpose.

GENERAL PROVISIONS

Sec. 4. Section 10101 of title 49, United States Code, is amended

(a) in subsection (a)(2) by inserting "of passengers" after "motor carrier";

(b) in subsection (a)(2)(A) by striking "shippers, receivers,";

(c) in subsection (a)(2)(B) by striking "shipping and";

(d) in subsection (a)(2)(E) by striking "and small shippers";

(e) in subsection (a)(2)(H) by striking "and" after the semicolon;

(f) by striking subsection (a)(2)(I) and the connector "and" at the end thereof;

(g) in subsection (a)(3)

(1) by striking "(3) in regulating transportation by motor carrier of passengers";

(2) by striking "(A) to" and inserting "(I)" in lieu thereof;

(3) by striking "(B) to" and inserting "(J)" in lieu thereof; and

(4) by striking "(C) to" and inserting "(K)" in lieu thereof.

Sec. 5. Section 10102 of title 49, United States Code, is amended—

(a) in paragraph (9)(C)

(1) by inserting "a motor carrier of property or" after "transportation"; and

(2) by striking ", II," after "subchapter I";

(b) in paragraph (11) by striking "and such other similar property as the Commission may provide by regulation" each time it appears; and

(c) in paragraph (12) by adding the following new sentences at the end thereof:

"'Motor carrier' is further defined as meaning a motor carrier of passengers and does not include a motor carrier of property unless otherwise specifically stated. This further definition is not applicable to the definition of motor carrier as used in other subtitles or titles of the U.S. Code."

INTERSTATE COMMERCE COMMISSION ADMINISTRATION

Sec. 6. Section 10322 of title 49, United States Code, is amended—

(a) in subsection (a)

(1) by striking ", or section 10934" at the end of the first sentence;

(2) by striking "10530," in the second sentence;

(3) by striking "10922(i)(2), 10922(i)(4)" in the second sentence and inserting "10922(h)(2)" in lieu thereof;

(4) by striking "10934(c)," in the second sentence; and

(5) by striking "10922(c)(2)(A)" in the third sentence and inserting "10922(b)(2)(A)" in lieu thereof;

(b) in subsection (b)(1) by striking "Except as provided in paragraph (2) of this subsection, a" and inserting "A" in lieu thereof;

(c) by striking subsection (b)(2); and

(d) by redesignating subsection (b)(3) as subsection (b)(2).

JURISDICTION

Sec. 7. Section 10521 of title 49, United States Code, is amended—

(a) by adding the following new sentence at the beginning of subsection (a):

"Notwithstanding any other provision of law, the Interstate Commerce Commission has no jurisdiction over motor carriers of property except as provided in subsection (c)."; and

(b) by adding "of passengers" after "over transportation" in subsection (a);

(c) in subsection (b) by striking "10922(c)(2)" each time it appears and inserting "10922(b)(2)" in lieu thereof; and

(d) by adding at the end thereof the following new subsection:

"(c) The Commission shall retain jurisdiction over a motor common carrier providing transportation of household goods for the purposes of sections 10934, 11341, and 11342 until three years after the effective date of this act."

* * * *

RATES, TARIFFS, AND VALUATIONS

Sec. 22. Section 10705 of title 49, United States Code, is amended—

(a) in subsection (a)(1) by striking "(except a motor common carrier of property)";

(b) by striking subsections (b)(1) and (b)(2);

(c) by redesignating subsections (c) through (g) as subsections (b) through (f);

(d) in subsection (b) as redesignated, by striking the comma after "rail carrier" and inserting "or" in lieu thereof and by striking ", or motor common carrier of property" in the second sentence;

(e) in subsection (e) as redesignated by subsection (c) of this section by striking "or (b)";

(f) in subsection (f) as redesignated by subsection (c) of this section by striking "(f)" after "subsection" and inserting "(e)" in lieu thereof; and

(g) by striking subsection (h).

Sec. 23. Section 10706 of title 49, United States Code, is amended—

(a) in subsection (a)(2)(A) by striking "(c)(1)(B)-(E)" and inserting "(d)(1)(B)-(E)" in lieu thereof;

(b) by striking subsection (b)(3)(D) and by redesignating subsections (b)(3)(E) through (b)(3)(H) as subsections (b)(3)(D) through (b)(3)(G); and

(c) by striking subsection (b)(4) and by redesignating subsection (b)(5) as subsection (b)(4).

Sec. 24. Section 10708 of title 49, United States Code, is amended—

(a) in subsection (d)(1) by striking "motor common carrier of property or";

(b) in subsections (d)(1)(A) and (d)(1)(B) by striking "carrier" each time it appears and inserting "freight forwarder" in lieu thereof;

(c) in subsection (d)(2) by striking "motor common carriers of property or"; and

(d) in subsection (d)(2)(B)(i) by striking "carriers or".

* * * *

Sec. 36. Section 10762 of title 49, United States Code, is amended—

(a) in subsection (a)(1) by striking the last sentence; and

(b) by striking subsection (g).

Sec. 37. Section 10766 of title 49, United States Code, is amended in subsection (b) by striking ", providing transportation subject to the jurisdiction of the Commission under subchapter II of that chapter,".

Sec. 38. The analysis of chapter 107 of title 49, United States Code, is amended—

(a) by striking

"10732. Food and grocery transportation." and inserting in lieu thereof

"10732. Backhaul allowances.";

(b) by striking

"10733. Rates for transportation of recyclable materials." and inserting in lieu thereof

"10733. Repealed."; and

(c) by striking

"10735. Household goods rates—estimates; guarantees of services.";

and inserting in lieu thereof

"10735. Repealed.".

* * * *

Enclosure 9

Section by Section Analysis of the Trucking Deregulation Act of 1985

[Excerpt]

This bill eliminates all federal economic regulation of the trucking industry; it eliminates entry controls and rate regulation; eliminates antitrust immunity for collective ratemaking; eliminates tariff publication requirements; eliminates the "common carrier obligation"; and transfers jurisdiction for consumer protection in household goods operations to the Federal Trade Commission.

There is vigorous competition not only within the for-hire motor carrier industry, but also from other elements of the transportation sector, such as private trucking, freight forwarders, and railroads, and potential competition from independent owner-operators, as well. Hence, there is no need for continued regulation of the trucking industry.

Section 1

The short title of the bill is the "Trucking Deregulation Act of 1985."

Section 2

The purpose of the bill is to reduce unnecessary and burdensome government regulations and to insure the competitiveness and efficiency of transportation by motor carriers of property in the United States.

Section 3

This section states the findings of Congress. It sets out that the statutes governing Federal regulation of motor carriers of property are outdated and must be revised to reflect transportation needs and realities of the present and future; and that government regulation has resulted in operating inefficiencies and anticompetitive pricing and should be reduced.

Section 4

This section amends the transportation policy of the Interstate Commerce Act to reflect the elimination of economic regulation of motor carriers of property.

Section 5

This section amends section 10102(12) of title 49 USC by further defining motor carrier as used in subtitle IV of title 49 as only meaning a motor carrier of passengers. It clarifies that the intent of this Act is to remove Interstate Commerce Commission regulation of motor carriers of property.

Section 6

This section deletes the procedural guidelines of section 10322 of title 49 USC for handling applications involving motor carrier transportation incidental to trailer on flatcar or container on flatcar service by rail or registration certificates for foreign motor carriers. This is a conforming change, since this legislation eliminates the necessity for applying to the Interstate Commerce Commission for any kind of motor carrier authority.

Section 7

This section amends section 10521 of title 49 USC to remove Interstate Commerce Commission jurisdiction over motor carriers of property, with one limited exception regarding household goods carriers. This exception allows the Interstate Commerce Commission to maintain jurisdiction over motor carrier transportation of household goods for three years after the effective date of the Act, for the limited purposes of retaining special antitrust immunity for household goods van lines (so that they can continue to engage in certain business relationships with their own local agents) and of retaining the Interstate Commerce Commission's power to approve or disapprove pooling agreements between a van line and its

agents. This jurisdiction over household goods carriers is retained for three years in order to minimize possible disruption resulting from the eventual removal of all special antitrust immunity for household goods van line-agent relationships. The delayed effective date of removal of immunity will give van lines and their agents additional time to develop corporate business structures and relationships that do not require special antitrust immunity.

* * * *

Section 22

This section amends section 10705 of title 49 USC by removing the authority of the Interstate Commerce Commission over motor common carriers of property to prescribe through routes, joint classifications, joint rates, the division of rates, and the conditions under which those routes must be operated.

Section 23

This section amends section 10706 of title 49 USC by removing Interstate Commerce Commission jurisdiction for providing antitrust immunity to motor carriers of property. Under the provisions of section 83 of this legislation, elimination of antitrust immunity will occur on July 1, 1986. This section does not disturb antitrust immunity for motor carriers of passengers or other carriers.

Section 24

This section amends section 10708 of title 49 USC to remove Interstate Commerce Commission jurisdiction to investigate, suspend, revise, or revoke any rate of a motor common carrier of property on the grounds that such rate is unreasonably high or low. The "zone of rate freedom" provided by the Motor Carrier Act of 1980 would remain applicable only to freight forwarders.

* * * *

Section 36

This section amends section 10762 of title 49 USC by removing the requirement for motor carriers of property to publish, file, and keep tariffs open for public inspection.

Section 37

This section amends section 10766 by deleting the requirement that freight forwarders may only contract with Interstate Commerce Commission regulated motor carriers of property.

Section 38

This section makes changes in the analysis of Chapter 107 of title 49 to conform to the changes made in sections 19 through 37.